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Supreme Court, U. S.
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No. 97-738

In The

Supreme Court of the United States

October Term, 1997

CITY OF OMAHA,

Petitioner,

v.

ROYCE DOANE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner attempts to invoke this Court's jurisdiction pursuant to Supreme Court Rule 10(a) upon the claim that a conflict exists between the Circuits on the following issues:

1) Whether mitigating factors or measures are to be considered in determining whether an individual has an impairment which limits a major life activity under the ADA; and

2) In the case of a law enforcement position, whether a plaintiff is required to show an ability to perform the duties of such position without endangering other persons as part of the burden in establishing an ability to perform the essential job functions. Pet. 6, 9.

Since these are the only issues upon which Petitioner claims the existence of a conflict between the Circuits, although such contentions are erroneous as discussed, *infra,* none of the other issues referenced in the Petition should be considered in view of the limited considerations governing Review on Certiorari.

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STATEMENT OF THE CASE

While denial of the Petition is required simply upon review of the cases cited by Petitioner which do not as claimed establish a conflict among the Circuits, Rule 15(2) of this Court instructs the Respondent to address any perceived misstatements of fact or law in the Petition which bear upon the issues which would properly be before the Court if Certiorari were granted. In view of that instruction, Respondent will address multiple misrepresentations of facts which Petitioner has set forth under three distinct headings on pages 3-5 of its Petition.

Initially, Petitioner argues that Respondent was not disabled within the purview of the ADA because he had not suffered an impairment that substantially interfered with the major life activity of seeing. In support thereof, it claims that the evidence of Respondent's medical experts was that his loss of sight in the left eye did not interfere with his ability to see as well as the general public. Pet. 3-4. The evidence is totally contrary to Petitioner's representation in this regard inasmuch as Respondent's medical experts testified that his blindness in one eye substantially limited his major life activity of seeing since he cannot sense depth in the same manner as persons with binocular vision and that his peripheral vision is limited due to his impairment. App. 7.

Petitioner's next contention that it had not perceived Respondent to be disabled within the purview of the ADA is totally at odds with the admission testimony of its hiring agent, Chief of Police Skinner. Pet. 4. Chief Skinner admitted that he rejected Respondent's employment application because he perceived that

Respondent's visual problems would be a significant limitation. App. 9.

Petitioner's last claim that Respondent was not qualified to perform the essential functions of law enforcement officer is premised upon the factual misstatement that Respondent did not present any evidence that he was qualified for the position of a police officer except his performance of some eleven years earlier. Pet. 5. Contrary to Petitioner's representation in this regard, Respondent testified as to meeting all of the specific qualifications for the job and the medical experts testified that he made the adjustments necessary to compensate for the loss of depth perception and peripheral vision by learning to work with environmental clues and the adjusting of his head position. App. 7, 10. Additionally, vocational rehabilitation expert Marchisio testified that Respondent could perform the essential functions of the job. App. 20.

Petitioner makes an additional gross misrepresentation of fact, claiming that Respondent presented no evidence that a non-disabled person was hired in his place. Pet. 5. Although such misrepresentation of fact is totally disconnected with any of the arguments advanced by Petitioner, a response is in order. Respondent was denied the opportunity to enter a police training class because of his disability or perceived disability. The available police positions were filled by the recruits who had successfully completed the class. By virtue of the City's policy of not hiring individuals with any disabilities or handicaps for police officer's positions, it was reasonable for the jury to infer that Petitioner hired a non-disabled person in place of Respondent. App. 3, 21, 26.

REASONS FOR DENYING THE WRIT

I. There is no conflict between the Circuits relative to the Eighth Circuit's holding that the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures.

Petitioner represents that the holdings of the Seventh and Fifth Circuits are in conflict with the Eighth Circuit's opinion that the determination of disability should be made without regard to considering the effects of mitigating measures. Pet. 6. Petitioner cites the holdings of *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1994); and *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1997) in support of its contention. Pet. 7. A reading of such decisions discloses otherwise. Here, the Eighth Circuit specifically approved the EEOC interpretive guideline set forth in 29 C.F.R. Pt. 1630, App. § 1630.2(j) "That the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." App. 6, 7, 72. The Seventh Circuit in *Roth* at 1454 adopted the identical EEOC guideline. In *Ellison*, the Fifth Circuit refused to consider the application of such EEOC guideline since the Plaintiff had not presented the issue in the District Court. *Id.* 191. Thus, contrary to the representations of Petitioner, there is no conflict among the Circuits on this issue.

Petitioner then misrepresents the Eighth Circuit's holding by suggesting that the Court used mitigating factors, including Respondent's internal subconscious

adjustments. Pet. 7. To the contrary, the Eighth Circuit specifically found that while Respondent's brain has mitigated the effects of his impairment, the Court's analysis of whether he was disabled, did not include consideration of mitigating measures. App. 8. The Eighth Circuit's observation that Respondent's internal subconscious adjustments of his brain has mitigated the effects of his vision impairment is not in conflict with any of the holdings of other Circuit Courts, federal regulations or interpretive guidelines of the EEOC as argued by Petitioner. Pet. 6. Petitioner cites no authority for such an unfounded argument.

On page 7 of the Petition, it is misrepresented that Respondent's experts testified that no major life activity was impaired. To the contrary, their testimony was " . . . that Doane's blindness in one eye substantially limits his major life activity of seeing". App. 7.

Petitioner includes under its argument of a conflict among the Circuits the disjointed irrelevant reference of being substantially limited in the major life activity of working. Pet. 8-9. As observed by the Eighth Circuit, the major life activity involved in this case was that of seeing, not working, and thus Petitioner's argument is inapposite in this case. App. 9.

II. The Eighth Circuit's opinion is not in conflict with the First Circuit on the issue of an individual being qualified to perform the essential functions of a job per the ADA.

The Petitioner claims that the Eighth Circuit did not require Respondent to prove that he could perform the

job of a police officer in a manner which would not endanger others in order to meet his burden of proving he was qualified and on the basis thereof claims a conflict exists with the First Circuit's opinion in *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997). Pet. 9-10. In *Amego*, the Court simply held that if the essential job function implicated the safety of others, a plaintiff must demonstrate that he or she could perform the function in a way that would not endanger others. The Court simply held that in order to be qualified to perform the essential functions of some jobs, a showing must be made that you will not endanger others. The Eighth Circuit holding is not in disagreement with such a principle of law. There is nothing in its opinion that directly or indirectly suggests otherwise.

Here, the Eight Circuit found that a reasonable jury could have concluded on the basis of the evidence that the Respondent could indeed perform the essential functions of the job of a police officer which obviously included doing the same in a manner which would not endanger himself or others. App. 10-11. Ironically, Petitioner makes this argument in the face of its contention throughout the litigation that Respondent did not have an impairment which substantially limited his major life activity of seeing because he learned to adapt and accommodate himself to his impairment. App. 7.

Finally, Petitioner claims that there is somehow a conflict between the Eighth Circuit's opinion and the First Circuit's decision in *Amego* regarding a person who is perceived as having an impairment that substantially limits a major life activity as being disabled within the meaning of the ADA. Petitioner's argument on Page 11 of

its Petition in this regard makes no sense nor does it make any reference concerning any conflicts among the Circuits in this regard. Here, the Eighth Circuit quite pointedly noted that even if Respondent's condition did not actually substantially limit his ability to see, the Court's conclusion would be the same since Petitioner perceived Respondent as having an impairment that substantially limited a major life activity per Chief Skinner's admission. App. 9. The Court's disallowance of the jury instruction challenged on Page 11 of the Petition related to a proposed instruction for the life activity of working which was not involved in this case and for that reason was properly rejected as noted by the Eighth Circuit. App. 9.

CONCLUSION

The Petition is frivolous, being a composite of misrepresentations of fact and law. It should be denied and appropriate relief as provided by Rule 42(2) of the Rules of the Supreme Court granted.

Respectfully submitted,

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